No. 88-52

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1988

BUFFALO WIRE WORKS COMPANY, INC.,
*Petitioner,*

vs.

UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, SAMUEL PIERCE, as Secretary of the United States Department of Housing & Urban Development; BUFFALO URBAN RENEWAL AGENCY (previously known as Department of Urban Renewal and Department of Community Development of the City of Buffalo), CITY OF BUFFALO, JAMES D. GRIFFIN, as Mayor of the City of Buffalo, and as Chairman of the Buffalo Urban Renewal Agency,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

## REPLY BRIEF FOR PETITIONER

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## Question Presented

Whether Petitioner is Seeking a Double Recovery for Moving Expenses?

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Note: This Reply Brief is in response to both the Opposition Brief of United States Department of Housing and Urban Development, Samuel Pierce, as Secretary of the United States Department of Housing and Urban Renewal (hereinafter referred to as the Federal Respondents), and the Opposition Brief of Buffalo Urban Renewal Agency, City of Buffalo, James D. Griffin (hereinafter referred to as the City Respondents).

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BUFFALO WIRE WORKS COMPANY, INC.,
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vs.

UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, SAMUEL PIERCE, as Secretary of the United States Department of Housing & Urban Development; BUFFALO URBAN RENEWAL AGENCY (previously known as Department of Urban Renewal and Department of Community Development of the City of Buffalo), CITY OF BUFFALO, JAMES D. GRIFFIN, as Mayor of the City of Buffalo, and as Chairman of the Buffalo Urban Renewal Agency,
*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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## REPLY BRIEF FOR PETITIONER

## I.

**Buffalo Wire Works does not seek a double recovery for moving expense.**

The central contention of both the Federal Respondents and the City Respondents is clear, *i.e.*, that the Petitioner, Buffalo Wire Works (BWW), is attempting to be paid twice for its moving expenses. This is, and always has been, the only real issue in this case.

The Federal Respondents state that the "Question Presented" in this case is "Whether petitioner is entitled to payment for moving expenses under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq., after having received such expenses in a New York condemnation proceeding.*" (Federal Brief, p. I). (Emphasis added).

The City Respondents state: "In a nutshell, what Petitioner seeks is a double recovery." (City Brief, p. 10.)

The reason for these statements is clear. Both are based on the contention that BWW already has received an award for moving expenses as part of the state condemnation award.

BWW's response is equally clear: *No part of the condemnation award represented a reimbursement of moving expenses.*

The basis of BWW's response is two-fold:

A.

**In prior tax litigation the Tax Court of the United States and the Court of Appeals for the Second Circuit had already determined that no part of the state condemnation award constituted a reimbursement of prior moving expenses. Under settled law these holdings are binding on the United States, and its subordinate officials.**

The Federal and City Respondents claim that the prior holdings of the Tax Court and the Second Circuit are not preclusive, on the ground that the issue in the tax case involved §1033 of the Internal Revenue Code and the issue here involves substantial equivalency under §4631(b) of the Relocation Act. This attempt to escape the *collateral estoppel* effect of the prior tax litigation should fail for several reasons:

First, this argument by the Respondents amounts to no more than saying that the *ultimate* question in the tax litigation was whether a portion of the state award should be included in income for tax purposes whereas the *ultimate* question in this case is whether BWW is entitled to a payment under the Relocation Act. *With this proposition BWW agrees.* However, what this argument does not (as it cannot) deny is that the *underlying issue* in this case is precisely the same as the *underlying issue* in the tax litigation, *i.e.*, whether, as a matter of New York law, any part of the state condemnation award constituted or represented a reimbursement for moving expenses. Put another way, the fact that the Tax Court made its determination "for purposes of Federal income taxation" is essentially irrelevant. What is relevant, as a matter of the law of collateral estoppel, is that in a determination necessary to its conclusion, the Tax court held that the nature and effect of the State condemnation award under New York law was in *no way* ("no part") a recovery of prior moving expenses. "[W]here the underlying issue in two suits is

the same, the adjudication of the issue in the first suit is determinative of the same issue in the second suit." *Lee v. F.T.C.*, 113 F.2d 583, 585 (8 Cir. 1940).

Moreover, the Respondents, especially the Federal Respondents, rely on the Second Circuit's prior opinion in *E. R. Hitchcock Co. v. United States*, 514 F.2d 484 (1975), for the proposition that nonrecognition under §1033 is not incompatible with BWW's having received a reimbursement for moving expenses. Even if this a fair reading of *Hitchcock*, it is irrelevant to the instant case for two reasons. First, Judge Gaffe in the Tax Court, in response to the Government's contention that *Hitchcock* was inapposite since it involved Connecticut law and not New York law, replied as follows:

> There is sufficient difference between the laws of Connecticut and New York to negate the applicability of *E. R. Hitchcock Co.*, to the facts of this case. Under Connecticut law, the fixing of a condemnation award is done upon the basis of the fair market value of the property. *Harvey Textile Co. v. Hill*, 135 Conn. 686, 689, 67 A.2d 851, 852 (1949). On the other hand, under New York law, the value of fixtures is determined as being the lower of two amounts: (1) the difference between their present value in place and their salvage value; and (2) the costs of disassembling, trucking, and reassembling the fixtures. *Rose v. New York*, 24 N.Y.2d 80, 246 N.E.2d 735 (1969). Whichever amount is used, *such amount becomes the value of fixtures* which are removed or could be removed. Thus, as under Connecticut law, compensation is made *from the value of the property taken.* New York law is not different from Connecticut law in that respect; it is simply more definite than Connecticut law in its use of moving expense data. Nevertheless, in both states the use of moving expenses is *as a measure of value*, and it is upon that basis that the court of appeals made its decision in *E. R. Hitchcock Co.* (Pet. App. 50a-51a.) (Emphasis added.)

Secondly, the Second Circuit in its unpublished opinion in the tax litigation *in this case* made it clear that under New York law the condemnation award did not represent a reimbursement for moving expenses, stating:

> "The $430,162 awarded the taxpayer by the City of Buffalo was not a reimbursement of the taxpayer's moving expenses but money representing the value of property involuntarily converted by condemnation into cash. *E. R. Hitchcock Co. v. United States*, 514 F.2d 484, 487 (2d Cir. 1975). Under New York law this *method of valuation* may be adopted where it is smaller than the amount which would be arrived at by deducting salvage value from the present value of the fixtures in place, which in this case would have resulted in an award of $976,813. *Rose v. New York*, 24 N.Y.2d 80, 298 N.Y.S.2d 968 (1968)". (Emphasis added.)

Finally both the Federal and the City Respondents have incorrectly characterized the tax case as involving only §1033 of the Code. As recited in BWW's Petition for Certiorari, pp. 11-12, the applicability of §1033 was only one of three theories upon which the Commissioner of Internal Revenue relied in the Tax Court. The other two were the "tax benefit theory" and the "right of reimbursement theory." Indeed, in its Reply Brief in the Second Circuit on the appeal of the tax case, the Government argued as follows:

> (1) the §1033 issue was "not before this Court";
>
> (2) "the deficiency asserted here was not based on the theory that the portion of the award reimbursing taxpayer's moving expenses was ineligible for treatment under Section 1033, but rather on the tax benefit rule, which requires taxpayer to restore to income the amount previously deducted as moving expenses and fully compensated by the condemnation award",

(3) "the presence of the tax benefit considerations distinguishes this case from Hitchcock, where the Court was simply not called upon to consider the tax benefit rule"; and

(4) the §1033 issue was "a phantom issue" and not "the crux of our case"

See Buffalo Wire Works v. Commissioner, 659 F.2d 1058 (2d Cir. 1981). (Reply Brief for the Appellant, pp. 1-2, attached as Appendix A.)

But, as Judge Goffe in the Tax Court accurately pointed out, all of the Government's theories, including the "tax benefit theory" (which is precisely the same as "double recovery" theory of the Respondents in this case)[1] were "premised on the same crucial determination,

---

[1] The Government's brief on appeal in the tax case used the language "double-dipped" (See Appendix A to this Reply Brief, at p. 4.) It should be noted that the City Respondents in their Opposition Brief accuse Petitioner of ignoring "another point" and of inferring on p. 21 of the Petition that the opposite of this other "point" is true. This other "point" is stated as follows: "The treatment, for tax purposes, of its condemnation award, under the Tax Court and Second Circuit rulings is identical to the tax treatment provided by the Act to moving expense awards: No payment received under [the Act] shall be considered as income for purposes of Title 26. 42 U.S.C. §4636."

It is difficult to know what the City Respondents think this other "point" is since they do not bother to explain it in their Brief. This is probably because the City Respondents are not quite sure how 42 U.S.C. §4636 fits into this case. The way it fits in is as follows: If, as a result of this Court's reversal of the decision below, BWW is paid moving expenses, the question then would arise whether such amounts would be includable in the gross income of BWW. There is no doubt that such amounts would be includable under the tax benefit rule. (That is what is inferred on p. 21 of the Petition). But the question would remain: Which should control? 42 U.S.C. §4636 or the tax benefit rule? Precisely the same type of question was decided by this court in *Hillsboro National Bank v. Commissioner*, 460 U.S. 370 (1983). See Del Cotto and Joyce, *Double Benefits and Transactional Consistency Under the Tax Benefit Rule*, 39 Tax L. Rev. 473, 483, 489-90 (1984). (co-authored by co-counsel to Petitioner).

namely that a portion of the petitioner's condemnation award constituted reimbursement of moving expenses." (Pet. App. 45a). Directly in response to the "tax benefit theory" Judge Goffe held that "no part of that condemnation award constitutes a recovery of prior moving expenses." (Pet. App. 52a).

To state the collateral estoppel argument in a slightly different fashion,

> (1) if, as this Court held in *Hillsboro National Bank v. Commissioner*, 460 U.S. 370 (1983), the "tax benefit rule" requires an inclusion in income if a "later event is . . . fundamentally inconsistent with the premise on which the deduction was initially based", and
>
> (2) if, as the Tax Court and the Second Circuit held in the tax litigation, the state eminent domain award for BWW's fixtures was not "fundamentally inconsistent" with BWW's prior deduction for actual moving expenses, then
>
> (3) how can it seriously be contended that the same eminent domain award had "substantially the same purpose and effect" as a payment under the Relocation Act within the meaning of 42 U.S.C. §4631(b)?

B.

**The holdings of the Tax Court and the Second Circuit in the tax litigation properly reflect the economic realities of this case. In the state condemnation award, BWW was compensated for the value created by its previous expenditures in moving its machinery to the old plant and making it an integral part of its business at the old plant. What BWW now claims is reimbursement for additional outlays made in moving the machinery an integral part of the new plant.**

It is clear that a condemnor is required, under the law of eminent domain, to make just compensation for what it has taken, *but only for what it has taken.* That is why the City was required to compensate BWW for the in-place-value of its machinery fixtures even though BWW kept the machinery. It is also why the City *was not required* to pay for the cost of moving the fixtures to a new plant.

The Federal Government, however, *is required* to pay for the cost of moving machinery to a new plant because Congress has made that policy decision in the Relocation Act. The important point that must be kept in mind, as both the Tax Court and the Second Circuit recognized, is that this case involves *two sets of expenditures.* Firstly, there were the expenditures of moving the machinery to the old plant and integrating it with the land and building as part of a going operation. That is what the City paid for in the condemnation award.

Secondly, there were the distinct and additional expenditures of moving the machinery to the new plant and making it part of the going operation with the new land and buildings. BWW has never been paid for those expenditures, as the Tax Court and the Second Circuit have so held. It is reimbursement for these latter expenditures that BWW now seeks.

The failure of the Respondents to recognize the duality of BWW's expenditures is the reason for their erroneous view that BWW is seeking a double recovery. In this respect it bears repeating that this was precisely the same error which led the Commissioner of Internal Revenue to rely on the tax-benefit rule and the reimbursement rule in the tax litigation.[2]

This error also explains the failure of the City Respondents to understand how the Relocation Act distinguishes between payments for machinery that is moved and payments for machinery that is not moved. In its Opposition Brief, the City Respondents state:

> The Act is crystal clear that *even when fixtures are completely liquidated and left at the old facility, the maximum Federal relocation payment can never exceed the cost of moving those same fixtures.* 42 U.S.C. §4622(a)(2). How much more so, then, when fixtures are moved and kept by the same owner, should the relocation payment be capped at the cost of moving! (Brief, p. 17; emphasis in the original).

---

[2] Indeed this same mistake is behind the Federal Respondents failure to appreciate why "the decision below puts an enterprise that abandons its fixtures 'in a substantially better position' than one that chooses to remove them." See Footnote 2 of the Opposition Brief of the Federal Respondents. In that footnote it is asserted that "Contrary to petitioner's claim, moreover, the value of their use to the dislocated enterprise is not necessarily a low 'salvage value,' but may instead approximate their in-place value at the original facility."

What this assertion misses is the economic fact that fixtures retained from the old facility do not magically reappear at the new facility, in place and ready to operate. To put them in place and to "approximate their in-place value at the original facility" require the expenditure of money for "moving" including such things as "pneumatic" . . . water . . . [and] electrical . . . reconnect "rigging and trucking" etc. Here it cost BWW $295,773.24 to put these "salvaged" fixtures "in-place". That is what it seeks from the Federal Government under the Relocation Act.

The fatal flaw in this argument is fairly simple and straightforward. The Act provides for three types of payments:

> (a) the condemnee's actual expenses of moving a business, farm, or other personal property,
>
> (b) actual direct losses of tangible personal property in moving or discontinuing a farm or business, but no more than what it would have cost to relocate such property, and
>
> (c) search expenses.

The legislative history of the act makes it clear that the payment for direct losses of tangible personalty (which is limited by what it would cost to relocate such property), applies where the condemnee "is entitled to relocate his property . . . but does not do so." H. Rep. No. 91-1656, 92 Cong., 2d Sess. 1970 U.S. Cong. & Adm. News 5850, at 5855-5856. (It should be noted that this portion of the House Report is omitted from the recitation of the legislative history on p. 12 of the Opposition Brief of the City Respondents).

The argument that the same rule should apply to machinery that is moved (indeed the City Respondents argues that the rule applies *a fortiori*) misses the obvious fact that *if a condemnee does not move his fixtures, there are no actual moving expenses incurred and therefore there can obviously be no claim for "actual" moving expenses under the Act.* Equally obvious is the fact that if, as in our case, the condemnee does move its fixtures, *there are actual moving expenses and the Act requires that they be reimbursed.*

## Conclusion

For these reasons, and for the reasons stated in the Petition, a writ of certiorari should issue to review the judgment of the Second Circuit.

Respectfully submitted,

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September 16, 1988

**APPENDIX A**

**Reply Brief for the Appellant**

**80-4224**

IN THE

# United States Court of Appeals

FOR THE SECOND CIRCUIT

---

BUFFALO WIRE WORKS COMPANY, INC.,
*Appellee,*

v.

COMMISSIONER OF INTERNAL REVENUE,
*Appellant.*

---

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT.

---

REPLY BRIEF FOR THE APPELLANT

---

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IN THE
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 80-4224

---

BUFFALO WIRE WORKS COMPANY, INC.,
*Appellee,*

v.

COMMISSIONER OF INTERNAL REVENUE,
*Appellant.*

---

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT.

---

# REPLY BRIEF FOR THE APPELLANT

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Without repeating the arguments contained in our opening brief, we believe a response should be made to various contentions raised by the appellee, and this reply brief is directed to that end.

1. Appellee's first argument (Br. 9-16), that the reimbursement for moving expenses, in lieu of payment for the condemned fixtures, is ordinarily eligible for favorable treatment under Section 1033 of the Internal Revenue Code of 1954 (26 U.S.C.), addresses an issue not before this Court. The Court decided this issue in favor of the taxpayer in *E.R. Hitchcock Co. v. United States,* 514 F. 2d 484 (1975), aff'g 382 F. Supp. 236 (D. Conn. 1974), a decision that we are not contesting here, as

taxpayer acknowledges (Br. 21).[1] Rather, we [2] assert that *Hitchcock* does not dispose of this case, because the deficiency asserted here was not based on the theory that the portion of the award reimbursing taxpayer's moving expenses was ineligible for treatment under Section 1033, but rather on the tax benefit rule, which requires taxpayer to restore to income the amount previously deducted as moving expenses and full compensated by the condemnation award. It should be noted that taxpayer does not and, we believe, cannot controvert that the presence of tax benefit considerations distinguishes this case from Hitchcock, where the Court was simply not called upon to consider the tax benefit rule. Accordingly, taxpayer's lengthy first argument attacks a phantom issue, while avoiding the crux of our case.

2. Taxpayer's repeated assertions that the parties stipulated that it did not receive reimbursement for its *actual* moving costs (Br. 15 and 17) distorts the intent of the stipulation.[2] The Commissioner obviously did not mean that taxpayer was not, in fact, compensated for its prior moving expenses; had that been the case, there would have been no reason for issuing the notice of deficiency that occasioned taxpayer's petition to the Tax Court. The stipulation means nothing more than that the state court's judgment and award reflected estimated rather than actual moving expenses. This is not surprising, in view of the fact that it would not have been possible to ascertain [3] actual moving expenses at the time the award was fixed, because the move had not yet

---

[1] "Br" references are to the appellee's brief.

[2] Taxpayer's brief incorrectly cites to p. 8 of the separately-bound appendix submitted with our opening brief. The applicable stipulation appears at page 11 of the appendix.

been completed. The move was not made until taxpayer accepted the award, and vacated the condemned property in preparation for transferring it to the condemnor. As a matter of fact, taxpayer incurred the bulk of the moving expenses in issue here after the award was fixed. Thus, the fact that the award was determined without reference to actual moving expenses is irrelevant to the question whether it was intended to reimburse such expenses.

3. Taxpayer argues, with numerous hypotheticals to illustrate the point (Br. 17, 18 and 25), that the concept of moving expenses entered into its condemnation award merely to measure the value of the condemned fixtures, and that, since it would have received the same amount whether or not it actually incurred the moving expenses, the amount cannot be considered as reimbursement for these expenses. This argument is unrealistic at best, and ignores the fact that state law characterization of an economic event cannot defeat the operation of a federal rule of law, like the tax benefit rule. *E.R. Hitchcock Co. v. United States, supra* at 485.

As taxpayer correctly points out (Br. 18), New York condemnation law offers the condemnee two choices: to remove the fixtures or to leave them in the condemned building, but awards the condemnee only an amount equal to the cost of the cheaper alternative, *i.e.*, moving costs or present in-place value less salvage value. In taxpayer's case, moving was less expensive, and this portion of the award was accordingly limited to estimated moving costs. Taxpayer, in fact, retained and moved its fixtures, deducting the expense of this move [4] and later receiving an amount exceeding its actual moving costs. There is no difference between taxpayer's actions and that of a condemnee who chooses not to move his fixtures, claims a loss deduction on their condemnation, and then receives full compensation for

the value of the condemned fixtures. By contrast, if taxpayer had abandoned or sold its fixtures, there would have been no moving expense deduction and no tax benefit (and no notice of deficiency to recover the tax benefit). Thus, contrary to taxpayer's assertion (Br. 22), there is no contradiction between extending Section 1033 treatment to an award for the condemnation of fixtures measured by the cost of removing them and requiring *this* taxpayer to restore to income amounts previously deducted as moving costs, which costs were later fully reimbursed by a condemnation award. Rather, the contradiction lies in taxpayer's attempt to treat the moving costs as an ordinary business expense for deduction purposes, but as part of a Section 1033 condemnation award for purposes of reporting its taxable income.

4. Taxpayer attempts to disguise the economic benefits it reaped from this inconsistency by refering to its investment of over $1 million, an amount in excess of its award, in replacement property, in addition to its payment of moving expenditures of $418,052 (Br. 23). Its ability to invest the entire award in replacement property, rather than merely the part in excess of the moving costs, however, supports our assertion that taxpayer "double-dipped," since one of the factors, if not the principal one, that [5] enabled taxpayer to upgrade its facility[3] was that it shared its moving expenses with the federal Government through their deduction, so that

[3] It cannot be denied that taxpayer did upgrade its facility by more than the $62,385 it spent in addition to its net award of $998,350. The taxpayer's facility at the time of condemnation was judged by the New York court as comprising land and buildings with fair market value of $635,000, plus the fixtures. After the condemnation, taxpayer had the same fixtures, plus land, buildings and fixtures it had acquired for $1,060,734, presumably representing their fair market value.

taxpayer's net (after-tax) moving expenses cannot have amounted to much more than $220,000, while the award reimbursed (on a pre-tax basis) more than $480,000, presumably leaving a comfortable surplus available for investment in replacement property.

[6] CONCLUSION

For the above reasons, as well as those set forth in our opening brief, the Tax Court's decision should be reversed.

Respectfully submitted,

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MARCH 1981

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof to him on this _____ day of March, 1981, in an envelope, with postage prepaid, properly addressed to him as follows:

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